Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Misuse of Internet Protocol (IP) Captioned Telephone Service	CG Docket No. 13-24
Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	CG Docket No. 03-123

COMMENTS OF SORENSON COMMUNICATIONS, INC. AND CAPTIONCALL, LLC

Michael D. Maddix
Director of Government
and Regulatory Affairs
SORENSON COMMUNCATIONS, INC.
4192 South Riverboat Road
Salt Lake City, UT 84123

Bruce A. Peterson
Senior Director of Marketing
CAPTIONCALL, LLC
4215 South Riverboat Road
Salt Lake City, UT 84123

John T. Nakahata
Christopher J. Wright
Timothy J. Simeone
Steven A. Fredley
Mark D. Davis
Walter E. Anderson
Kristine Laudadio Devine

WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Suite 1200
Washington, DC 20036
(202) 730-1300

Counsel for Sorenson Communications, Inc., and CaptionCall, LLC.

November 4, 2013

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I. INTRODUCTION AND SUMMARY

Sorenson Communications, Inc. ("Sorenson") and its wholly owned subsidiary, CaptionCall, LLC (collectively, "CaptionCall"), respectfully submit these comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM")[1] regarding proposed changes to IP CTS rules, including rate methodology, centralized verification of users, minimum standards, and minimum price requirements for IP CTS software. The Commission should be absolutely clear about one thing: if it imposes a rate-of-return methodology on IP CTS, or a methodology that essentially amounts to rate-of-return with a lag, as it did with the price caps for IP Relay, the Commission will destroy IP CTS, just as it is already destroying both IP Relay and VRS. Rate-of-return regulation in the context of TRS is both intellectually and financially bankrupt: because it would allow only meager margins of 1 to 2 percent, it cannot sustainably support functionally equivalent services for the deaf and hard-of-hearing. The Commission would be *de facto* deciding that only not-for-profit entities could provide TRS, and even then they would likely have difficulty obtaining financing. The Commission's historically narrow view of "allowable costs" further compounds this problem, by making real-world margins even smaller.

Rather than sinking IP CTS into the morass of bad rate-of-return regulation (or a nominally price-cap equivalent anchored in cost-of-service calculations, as is now the case for IP Relay), CaptionCall proposed an alternative that takes advantage of the Commission's ability to use several years' worth of state PSTN-based CTS competitive-bid data to approximate an

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[1] *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-118, CG Docket Nos. 13-24 & 03-123 (Aug. 26, 2013) ("Order" or "FNPRM").

appropriate market-based compensation rate. The Commission can initialize a market-based price cap using an average of the MARS rates for the years before IP CTS overtook CTS. Sorenson suggested using the simple average of 2008-2010, but the Commission could include other years (2007, 2011 and 2012) as well. Given that both IP CTS and CTS are labor-intensive, not capital intensive, there is no reason to believe that the market rate from a competitive bid for either service would be markedly different. CaptionCall proposed that the price cap would then have an annual adjustment of -0.5 percent, which would assure that rates declined each year, notwithstanding inflation. As a result, IP CTS providers would have to improve productivity each year so that they beat inflation by 0.5 percent—not an easy feat in an industry where an individual communications assistant must caption each call, and where wages and benefits thus serve as the principal costs.

Rate-of-return regulation would be just as disastrous for IP CTS as it has been for IP Relay and VRS—facts the Commission has yet to actually acknowledge or refute:

- The public utility rate-of-return ratemaking formula cannot, by its nature, generate a sustainable rate for a labor intensive industry. By its terms, the rate-of-return ratemaking formula provides for no margin (profit) on expenses; the only profit comes on booked capital investment. Under this formula, CaptionCall earns no profit on its principal asset—its workers—and earns only an 11.25 percent on its desks, some computer equipment, and perhaps a capital lease for office space. For VRS, that amounts to at best a 1-2 percent margin on all allowable costs (and well under 1 percent on actual total costs); it is difficult to see why IP CTS would enjoy a significantly better margin. A temp agency could not operate on these margins, and it is not reasonable to assume that IP CTS providers would fare any better. The FCC would be *de facto* limiting IP CTS to non-profit entities, and even then it is not at all clear that such entities could obtain financing for a high-risk, mandated low return operation.

- "Allowable costs," as defined by the Commission for other TRS services, have not included all the necessary costs of providing service. Notably excluded are actual taxes, end user equipment/software, research and development of equipment and functions beyond the mandatory minimum, installation of equipment, actual working capital, and financing. Without end user equipment, whether hardware or software, IP CTS service cannot exist. And all entities—including non-profits—must pay their

taxes, maintain working capital and finance capital investment, so excluding these costs masks the true extent to which allowed margins approach zero.

- The 11.25 percent rate-of-return permitted on book capital investment, which was developed for the Bell telephone companies in 1990—before the introduction of local telephone competition—is wholly out-of-date and inappropriate for much smaller companies operating in highly competitive, labor intensive markets.

- As the FCC has long recognized, rate-of-return ratemaking stifles innovation and efficiency. The FCC has thus abandoned rate-of-return ratemaking in nearly every other setting.

All of this means that the rate-of-return ratemaking formula creates a false benchmark as to a reasonable and sustainable rate for any TRS service, including IP CTS.

IP Relay exemplifies the consequences of adhering to the delusion that rate-of-return yields sustainable rates. This past June, the FCC reinitialized its IP Relay price caps using rate-of-return ratemaking calculations, then set an annual productivity factor using historical achieved reductions in average "allowable" costs per minute.[2] Significantly, the largest IP Relay provider had moved its relay center operations to the Philippines to take advantage of the lower cost of labor, which dramatically affected the Commission's calculations. Because the Commission failed to account for that relocation—and because of the inherent flaws in the rate-of-return methodology—the Commission set a rate that led Sorenson, then the second largest provider of IP Relay service, to leave the market, with the other U.S.-based provider threatening to depart as well. The Commission can avoid this result for IP CTS only if it eschews rate-of-return ratemaking and focuses on setting market-based rates using its experience under MARS.

With respect to the other items on which the Commission seeks comment:

- CaptionCall continues to believe that the minimum payment requirement for the IP CTS hardware- or software-based captioned phone is unlawful, a point it will

[2] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 28 FCC Rcd. 9219, ¶¶ 2, 12 (2013).

press on appeal to the D.C. Circuit. To the extent the requirement survives, however, the Commission should exempt low income consumers and consumers with fixed incomes from its unlawful $75 minimum price. For these consumers in particular, a $75 payment is a hardship that will either deny them access to IP CTS or force them to choose between IP CTS and other life-critical expenditures, such as food, shelter, and medicine. In addition, consumers should be required to make only one payment for whatever software or hardware they procure. If a consumer has paid $75 for hardware, he or she has satisfied the Commission's rationale for adopting the requirement and should not be required to pay $75 again for software, and vice versa. The same would be true with respect to multiple copies of software. The Commission should not, however, set one rule for hardware and another for software: it should maintain technological neutrality.

- To the extent the FCC's unlawful "default-off" rule survives judicial review, the Commission should adopt additional exceptions (which it failed to consider before adopting the current rules) that at least mitigate the unnecessary and service-degrading barriers the Commission has erected to use of this accommodation, including:

    - Allowing consumers in hard-of-hearing only households and in business settings with a dedicated desk phone to have the phone operate in a captions "default-on" mode;

    - Allowing consumers who install a non-captioning telephone adjacent to a captioning telephone to have the captioning telephone operate in a captions "default-on" mode.

- The Commission should not require a centralized database of registered IP CTS users. Such a database presents enormous privacy and security concerns without any attendant benefits, as per-call verification is not only impossible under the IP CTS call flow, but also makes little sense when the process will verify only the equipment being used and not the actual user. Attempting to verify the specific end user, such as through a PIN code, would render IP CTS even less usable and less functionally equivalent, particularly for an aging hard-of-hearing population.

- The Commission should not attempt to migrate administration and oversight of IP CTS to state TRS programs. Not only would such migration likely result in reduction of service quality—and perhaps unavailability of service in some areas—but would also abrogate the Commission's obligations under the Americans with Disabilities Act ("ADA").

- The Commission should avoid imposing mandatory minimums on service quality. IP CTS quality of service involves a complex system of tradeoffs. Given that it is impossible for any provider to deliver perfectly accurate captions instantaneously, some users may be willing to sacrifice accuracy for greater speed while others are willing to accept slower captioning to ensure more

accurate captions. No regulator, including the Commission, is positioned to make these decisions on behalf of consumers. Because the IP CTS market has multiple providers competing for customers, the Commission should let the market set minimum acceptable service standards.

II. A PRICE CAP REGULATORY APPROACH INITIALIZED BASED ON HISTORICAL STATE COMPETITIVE BIDDING RESULTS IS THE MOST APPROPRIATE METHODOLOGY FOR SETTING IP CTS COMPENSATION RATES.

CaptionCall filed its Petition for Rulemaking[3] because it believed that, although MARS provided a reasonable proxy for market-based rates in the past, the year-over-year increases under MARS were unnecessary. CaptionCall believed that it—and by extension other providers—could provide IP CTS without further increases to historical MARS-based rates, even if Captioned Telephone Service ("CTS") rates continued to rise in state contracts. Thus, CaptionCall proposed a shift to a price cap mechanism, initialized at the average of the MARS-based IP CTS rates for 2008-2010, with a guaranteed, year-over-year 0.5 percent annual price reduction.[4] Such a rate would continue to support the provision of innovative IP CTS services, but would push IP CTS providers to continue to improve efficiency faster than the rate of inflation. Absent such a change, CaptionCall predicted that the MARS-based rates would allow IP CTS providers' "earnings to increase as state contract rates increase, without forcing providers to become more efficient."[5]

The Commission, in the FNPRM, however, proposes alternatively to adopt a rate-setting methodology anchored in rate-of-return (also known as cost-of-service) ratemaking.[6] That would represent a huge step backward, further destabilizing an IP CTS service that the FCC has

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3 Petition for Rulemaking of Sorenson Communications, Inc., and CaptionCall, LLC, CG Docket No. 03-123 (Feb. 20, 2013) ("CaptionCall Petition").

4 CaptionCall Petition at 7-9.

5 *Id.* at 6.

6 FNPRM ¶¶ 120-123.

already crippled with its $75 minimum required equipment price and mandatory "default-off" requirements. The Commission cannot expect private sector entities to continue to provide IP CTS (and private sector investors and lenders to continue to provide necessary capital) if they cannot make a reasonable profit, yet that is what setting rates using the rate-of-return formula (or a price cap mechanism tied over time to rate-of-return calculations) does. Rate-of-return ratemaking stifles innovation and fails to deliver functionally equivalent service mandated by the ADA. In fact, over time, rate-of-return reduces service levels and robs eligible consumers of the quality communications services the ADA envisioned.

A. Rate Setting Methodologies Based on "Allowable" Cost, Rate-of-Return Calculations Will Destroy IP CTS with Unsustainably Low Rates, Just As With IP Relay and VRS.

CaptionCall believes that a price cap is the most appropriate rate methodology for IP CTS, given its proven track record of incentivizing efficiency and innovation.[7] The Commission has largely abandoned rate-of-return,[8] which rewards inefficiency, and discourages innovation,

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[7] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd. 20140 ¶¶ 43-45 (2007) ("*2007 TRS Rate Methodology Order")*; *see also e.g.*, *Joint Petition of Price Cap Holding Companies for Conversion of Average Schedule Affiliates to Price Cap Regulation & for Limited Waiver Relief,* Order, FCC 12-154, 27 FCC Rcd. 15753 ¶ 12 (2012) ("In 1990, the Commission concluded that incentive-based regulation is preferable to rate-of-return regulation, finding that several benefits would flow from the adoption of price cap regulation, including incentives for carriers to become more productive, innovative, and efficient.").

[8] *See, e.g.*, *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786 (1990) ("*Second R&O on Rates for Dominant Carriers*") (abandoning rate-of-return regulation for large incumbent local telephone companies); *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd. 8961 (1995) (affirming a commitment to the policy objectives that led the Commission to adopt price cap regulation); *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*USF/ICC Transformation Order*") (functionally ending rate-of-return for small telephone companies by adopting

and incentivizes overbuilt capital and increased accounting costs, while punishing innovation and efficiency by lowering profits when the rate base shrinks. In addition to these reasons, Sorenson has repeatedly explained[9] that rate-of-return ratemaking is fundamentally ill-suited to TRS, all forms of which are uniformly labor—not capital—intensive, because it requires a labor intensive firm to have almost no profit margin.

Rate-of-return's primary benefit—creating investment incentives for capital intensive industries by effectively guaranteeing a return—may make some sense in traditional common-carrier networks, which require substantial capital investment to acquire rights-of-way and deploy and maintain facilities. In those circumstances, consumers ultimately benefit from the capital investment that follows the regulator's assurance of a certain profit level. Rate-of-return, however, both over-encourages capital investment and discourages efficiency and innovation. If a utility reduces expenses or increases productivity, its reduced expenses cause its regulated rate to fall. In short, reduced profits undermine the provider's incentive to undertake socially beneficial actions. For this reason, the Commission has moved away from rate-of-return regulation even in capital-intensive markets like traditional common carrier services.[10]

Providers of non-capital intensive services experience all of the negative aspects of rate-of-return, without enjoying any of the benefits. Because IP CTS is labor intensive, rather than

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interstate terminating access rates and revenues based on formulas no longer tied to current costs or revenue requirements).

[9] *See, e.g.*, Comments of Sorenson Communications, Inc., CG Docket Nos. 10-51 & 03-123, at 37-45 (Mar. 9, 2012) ("Sorenson VRS Rate Methodology Comments"); Reply Comments of Sorenson Communications, Inc., CG Docket Nos. 10-51 & 03-123, at 39-41 (Mar. 30, 2012) ("Sorenson VRS Rate Methodology Reply Comments"); Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 10-51 & 03-123, at 59-60 (Aug. 19, 2013) ("Sorenson VRS Auction Comments").

[10] *See e.g.*, *Second R&O on Rates for Dominant Carriers*.

capital intensive, rate-of-return ratemaking is particularly inappropriate for IP CTS. IP CTS relies on Communications Assistants ("CAs") to manage voice-recognition and transcription software. In other words, *expenses*—salaries and benefits for CAs—and not capital investments, are providers' greatest costs. Rate-of-return for IP CTS would be akin to limiting a similarly labor-intensive business—an office temp agency—to earning a profit only on its investments in desks and office computers, but not on its actual product: the skills of the temporary employees it offers to its customers.

Although the Administrator has not publicly projected what an IP CTS rate based only on allowable costs would be, and the amount of return on investment that would be permitted, the Administrator's calculations with respect to VRS are instructive. For VRS, the cost-of-service ratemaking formula yields margins of only one to two percent of allowable costs.[11] There is no reason to expect significantly higher margins for IP CTS, which also has labor costs that far outstrip capital investment. If rates are set to yield such low margins, the only entities that could provide IP CTS—if any—would be non-profits, and even then it is highly unlikely that any private investor or lender will provide capital to finance the non-profit.

Moreover, as implemented for TRS, rate-of-return ratemaking has also excluded other costs, such as research and development, outreach, customer training, working capital, and even taxes, that are real and entirely non-discretionary.[12] Providers are left no ability to recover these

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[11] *See* Rolka Loube Saltzer Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 & 10-51, at 19-21 (filed May 1, 2013).

[12] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Order, 19 FCC Rcd. 12224 ¶ 37 (2004); *Structure and Practices of the Video Relay Service Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 8618 ¶ 195 (2013).

costs, even though they are a necessary part of providing service. Thus, under a rate-of-return compensation regime, an IP CTS provider's "ratebase" is very low and resulting returns are also low—so low that the only way to recover actual costs is to charge end users.

In contrast, a price cap methodology incentivizes providers to become more efficient, because providers will earn larger profits by doing so. Under a price cap regime, the Commission regulates *prices*, not costs. And as long as rates decline in inflation-adjusted terms, consumers benefit, even if the utility makes a larger profit.[13] Thus, if a utility cuts its expenses by becoming more efficient, it earns more profit; if it develops a new technology that enables it to provide the same or better service at a lower cost, it earns more profit. In addition it is free to reinvest that profit however it sees fit, including creating new and innovative products or through distributions to its owners.[14]

Given that rate-of-return is inappropriate for a labor-intensive industry like IP CTS, the Commission's specific questions regarding allowable costs, cost categories, and collection of cost and demand information are simply the wrong questions. Instead of trying to determine appropriate allowable costs for use in an outdated and ineffective rate-of-return methodology, the Commission should move forward to implement a price cap regime, initialized based on the market-based MARS data.

In implementing a price cap regime for IP CTS, however, the Commission must also avoid the missteps that caused the implosion of IP Relay—unless it is affirmatively seeking to sabotage IP CTS. In particular, the Commission should not initialize an IP CTS price cap based

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[13] John Haring & Evan Kwerel, Office of Plans and Policy, Federal Communications Commission, *Competition Policy in the Post-Equal Access Market*, Working Paper, at 31 (1987), *available at* http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp22.pdf.

[14] *See Price Cap Performance Review for Local Exchange Carriers* ¶ 28.

on IP Relay rate. Although both services use similar voice recognition technology, today's IP Relay rates were heavily influenced by the low offshore labor costs of the largest IP Relay provider, and have driven all but one provider with U.S.-based CAs out of providing IP Relay service—and even that one U.S.-based provider may not remain. The Commission should not assume similar IP CTS "off-shoring," especially because doing so means sending call content outside of the United States and subjecting it to the laws—and potential inspection—of other countries.

Furthermore, the Commission should not require "sharing" or other full or partial "true-up" mechanism to what would have been cost-of-service rates. Doing so ties providers back to the extremely low margins provided under rate-of-return regulation, and thus will similarly choke-off all capital, whether in the form of equity or debt.

B. A Price Cap Approach Will Create Incentives for Providers to Innovate and Operate Efficiently.

The last six years have shown that MARS is unlikely to reduce IP CTS rates. A properly constructed price cap mechanism, however, can achieve such results.

The Commission has shifted to price cap regulation in almost every context other than relay services.[15] As the Commission has noted, other rate methodologies, including rate-of-return methodologies, are "not designed to promote efficiency or innovation,"[16] while price cap methodologies are more likely to facilitate "broad innovations in the way firms do business."[17] By "placing limits on the rates carriers may charge for services…a carrier's primary means of

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15 *See e.g.*, *Second R&O on Rates for Dominant Carriers*.

16 *Connecting America: The National Broadband Plan*, at 147 (Mar. 16, 2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

17 *Second R&O on Rates for Dominant Carriers* ¶ 32 (referring to the deficiencies of rate-of-return regulation).

increasing earnings are to enhance its efficiency and innovate in the provision of service."[18] In this case, shifting to a price cap regime will encourage IP CTS providers to restrain labor prices and more efficiently use their resources, including innovation to develop new technologies. The development of new technologies will, in turn, lower the cost of providing IP CTS, further reducing the burden on the Fund.

A price cap regulatory mechanism requires the Commission to make four key decisions: (1) the levels at which to initialize the price cap; (2) the level of the "X" factor; (3) the length of time prior to a Commission review of performance under price caps; and (4) how to accommodate exogenous costs.

1. The Price Cap Reasonably Can and Should Be Initialized Based on State Competitive Bid Data Compiled for the MARS Methodology.

A price cap, of course, requires an initial rate, which ideally should reflect the rate that a competitive market would set. In the case of IP CTS, state competitive bid data—on which the MARS rate is based—provides a reasonable proxy for market-based rates for IP CTS. While state CTS uses PSTN technology and IP CTS uses IP technology to connect call centers with consumers, the two services are identical in that the principal cost driver for both is labor—hiring, training, and employing CAs. Thus, the Commission can and should use historical, state CTS-based, MARS rate data to set an initial rate for a price cap on IP CTS.

By using MARS as a basis for a price cap, the Commission can ensure a rate that accounts for the labor-intensive nature of IP CTS, while also acknowledging the limited potential for reduction in minutes and recognizing that the economies of scale in IP CTS are low. Every

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[18] *Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873 ¶ 36 (1989) ("*R&O on Rates for Dominant Carriers*").

minute of every CTS call handled, whether PSTN-based CTS or IP CTS, requires a CA on the phone to listen to and caption the call. Labor costs can therefore be expected to rise directly in proportion to minutes: the more minutes that are handled, the more labor will be needed. This will continue to be true even as technological developments permit enhancements to captioning speed and even accuracy. In an IP CTS call, the length of the call is governed by the speaking of each party, with the CA outside of the audio stream. Because of this arrangement, technological improvements are unlikely to materially shorten calls.[19] As long as the CA remains necessary to captioning, technology-based improvements in productivity will be limited. The labor-intensive nature of IP CTS also means that economies of scale are low. Each CA requires a work station, so as volume increases, the number of CAs must increase, and the number of work stations must also increase. In other words, even the amount of office and building space will scale proportionally with call volume.

The labor-intensive nature of CTS is as true in IP CTS as in PSTN-based CTS. Thus, past competitive bid information from state CTS programs is an appropriate source of data for determining a reasonable range for market-based IP CTS rates. This was the logic behind MARS in the first place, and it remains sound. Furthermore switching from the MARS rate to a price cap at this stage makes sense, as the MARS rate has continued to increase year-over-year. That is, it would have been just as reasonable to use MARS to initialize a price cap in 2007-2008 as it was to continue to use the MARS rate, except the Commission now has more years of experience to draw on to select a market-based rate for initialization.

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[19] This is in direct contrast to IP Relay, in which all communications flow through the CA, thus affecting the number of minutes overall because slower transcription of the voice end of the call will prolong the call.

The rate levels suggested by state competitive bids are not unreasonable simply because they are higher than those that would be generated using the FCC's "allowable" costs and the traditional rate-of-return ratemaking formula. For the reasons discussed above,[20] the calculations generated by using "allowable costs" in the traditional rate-of-return ratemaking formula will predictably generate unsustainably low rates—*i.e.*, a deceptively low benchmark for comparison. State competitive bid data does not suffer from these systemic methodological flaws.

CaptionCall continues to support a base rate of $1.6766, the average of the MARS rate from 2008, 2009, and 2010. Rates in 2011 saw a dramatic increase, which is why CaptionCall believes it and other IP CTS providers can sustainably offer service at the 2008-2010 average rate.[21] In contrast, the Administrator's "allowable" cost-based rate-of-return calculation yielded proposed rates of $1.48 per minute, substantially and unsustainably lower.[22] Particularly in light of all the other changes the Commission has made to IP CTS,[23] rates at this level would likely cause CaptionCall to cease providing IP CTS because of the very slim profit margin. As Sorenson has noted in other filings,[24] a profit margin at this level—around 1-2 percent—is simply not enough to justify continued investment.

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20 *See supra* Part II.A.

21 The Commission could choose to include other years (2007, 2011 and 2012) in determining the basis for a MARS-based price cap, though cost savings to the Fund would, of course, be lower.

22 FNPRM ¶ 120 & n.401.

23 *See* Order ¶ 2 (describing the permanent rules adopted for IP CTS).

24 *See* Sorenson VRS Rate Methodology Comments at 37-45; Sorenson VRS Rate Methodology Reply Comments at 39-41.

2. The "X" Factor Should Be Set No Higher than Inflation Plus 0.5 Percent.

As CaptionCall stated in its Petition, the Commission should adopt a price-cap formula that accommodates inflation and includes an efficiency (or "X") factor. CaptionCall's proposal of an annual adjustment of -0.5 percent—equivalent to an X factor of inflation +0.5 percent—is extremely reasonable, and there is no reasonable basis for setting a higher X given the labor-intensive nature of IP CTS. In fact, a good case could be made that X should be lower, but CaptionCall is willing to live with an annual adjustment of -0.5 percent.

The Commission's price cap formula for common carrier regulation adjusts the Price Cap Index each year by a combination of inflation (an upward adjustment) and an X factor (a downward adjustment).[25] Historically, the rationale for the X factor was that productivity increases in the telecommunications field were expected to outpace the economy as a whole, primarily due to continual declines in the cost of computing.[26] But unlike telephone service, which is capital intensive and relies specifically on computing technology, fiber optics, and storage, all of which have had dramatic price decreases, IP CTS is labor intensive. There is no reason to believe that IP CTS' input costs for a well-managed firm will decline faster than the economy as a whole. While an individual IP CTS provider may be able to wring out efficiencies through better management, these are likely to be one time improvements, and not recurring productivity enhancements as expected in computing power with Moore's law.

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[25] *Second R&O on Price Caps for Dominant Carriers* ¶ 5.

[26] However, since 2000, X for common carriers has been set to inflation (yielding an annual PCI adjustment of inflation-inflation, or 0, ignoring exogenous costs), because X was used only as a transition to industry negotiated average rate levels. *See Access Charge Reform, et al.*, 15 FCC Rcd. 12962 ¶ 144 (2000).

In this situation, the more reasonable assumption would be that productivity of IP CTS would track the economy as a whole, which would suggest a downward X factor adjustment of 0, in the absence of a stretch factor such as the FCC's historical consumer productivity dividend for common carriers. CaptionCall, however, believes that it can manage to an X of inflation minus 0.5 percent, which would ensure an actual decrease in IP CTS rates year-over-year, not just rate increases below the level of inflation. The Commission applied the same X Factor to IP Relay rates before it disastrously reset the X factor at unsustainably high levels.

Setting a higher X runs the risks of debilitating IP CTS, as the Commission has seen in IP Relay, where Sorenson stopped providing IP Relay and one of the two remaining IP Relay providers may also depart. The Commission must bear in mind that unsustainably low rates will preclude service with functionally equivalent quality levels that hard-of-hearing consumers deserve and the ADA mandates.

3. The Commission Should Not Conduct a Performance Review of IP CTS Rates in Less than Five Years.

CaptionCall proposes that the IP CTS base rate should be adjusted every five years. This period will give providers the ability to make investments to improve efficiency and lower administrative costs while also being short enough to allow TRS Fund contributors to benefit from any significant cost reduction. Although CaptionCall proposed three years in its petition for rulemaking,[27] that was before the Commission's actions with respect to IP Relay.[28] In the

[27] CaptionCall Petition at 8.

[28] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 27 FCC Rcd.7150 (2012).

light of that catastrophic action, as well as the Commission's VRS order,[29] which also set unsustainably low rates, markets will need to be reassured that IP CTS is stable in order to encourage investment.

4. The Potential for Exogenous Cost Adjustments Is Not a Sufficient Reason to Stick with MARS over a MARS-initialized Price Cap.

A price cap methodology generally must allow the Commission to make adjustments for cost changes beyond the control of providers that are not otherwise captured by the inflation factor. This "exogenous" cost adjustment is necessary to ensure that providers—and, consequently, their customers—are not penalized for cost changes that are the result of, for instance, regulatory changes.

Exogenous cost adjustments are not unique to a price cap regime; indeed, even the MARS rate can be adjusted for exogenous costs if necessary. Sprint complains that allowing exogenous cost adjustments due to changes in FCC regulations would render the IP CTS rate unpredictable,[30] but this argument ignores that the existing rates can be adjusted under similar circumstances. Under MARS, for instance, if state CTS contracts had less exacting quality standards than ones the Commission adopted, the MARS rates might be rendered insufficient, requiring an adjustment by the Commission. Sprint also fails to acknowledge that the benefits of enhancing efficiency and productivity, without harming disabled consumers, outweigh any incremental burden a price cap would impose beyond the MARS plan.

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[29] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Structure and Practices of the Video Relay Service Program*, Order, 26 FCC Rcd. 9972 ¶ 2 (2011).

[30] *See* Comments of Sprint Nextel Corporation, CG Docket Nos. 03-123 & 13-24, at 3 (March 25, 2013).

C. With Six Years of Data on State Competitive Bids for State CTS, Auctions/Competitive Bidding Are Unnecessary to Initialize a Market-Based Compensation Rate for IP CTS, and Add Unnecessary Complexity.

The Commission has also proposed alternatives to a price cap methodology, including an auction or competitive bidding. It has also asked whether it should adopt a true-up for any methodology it adopts.

As an initial matter, CaptionCall believes that an auction is functionally the same as competitive bidding, and CaptionCall does not believe that either method is appropriate or necessary here. Historical MARS data already provides an adequate basis for a market-based initial rate—the end-game of an auction or competitive bidding process. Thus, use of either of these procedures would be redundant and would only introduce unnecessary complexity and confusion, including, potentially, a reduction in consumer choice, at least with respect to the customers whose IP CTS service is being bid (which may or may not be all consumers[31]).

Furthermore, given the available historical market-based rate information, an auction will not allow the Commission to gather any new information regarding the price at which a provider is willing to offer service. An auction may be suitable for VRS—for which there is no historical market-based rate information—but is not appropriate or necessary for IP CTS. The Commission can initialize an IP CTS price cap rate using six years of competitive rate information. In contrast, setting the IP CTS rate by auction ignores that readily available information in favor of a lengthy and complex auction process, without any commensurate benefit.

Under no circumstances, however, should the Commission adopt a true-up. Though the Commission's stated concern is ensuring that IP CTS providers are sufficiently compensated for

[31] *Cf.* Sorenson VRS Auction Comments at 19.

their "reasonable costs," in reality, a true-up will only serve to undermine the benefits of any change in rate methodology adopted by the Commission. A true-up would, in essence, turn a price cap methodology into a rate-of-return methodology. The Commission's proposal to adopt "a weighted average or the lowest cost among providers of the service" in offering a true-up is, of course, preferable to the alternative—offering a true-up based on the actual reasonable costs of providers.[32] But offering a true-up introduces unnecessary complexity where it is not warranted. An IP CTS rate set under a price cap methodology and initialized using historical, market-based information—as CaptionCall has proposed—will ensure adequate provider compensation while also maximizing the economic incentives for increased efficiency and lower costs.

III. THE FUNDAMENTALLY UNLAWFUL $75 MINIMUM PRICE REQUIREMENT SHOULD, AT A MINIMUM, HAVE ADDITIONAL EXCEPTIONS TO IMPROVE THE ABILITY FOR HARD-OF-HEARING CONSUMERS TO HAVE ACCESS TO FUNCTIONALLY EQUIVALENT TELEPHONE SERVICE.

A. If the FCC Does Not Provide a Health Care Professional Certification Alternative to the Mandatory $75 Equipment Fee, It Should at Least Create a Low Income Exception to the $75 Minimum Price Requirement.

As CaptionCall will argue on appeal, the Commission should never have adopted the $75 minimum equipment price requirement. As Professor Samuel Bagnestos points out in his declaration in support of CaptionCall's request to stay that requirement, the Commission got "the analysis required by the ADA backwards."[33] However, if this requirement survives judicial review, the Commission should, at the very least, permit low-income users to obtain IP CTS equipment for less than $75.

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[32] FNPRM ¶ 127.

[33] Request for Stay of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 13-24 & 03-123 ("CaptionCall Request for Stay"), Ex. B, Declaration of Samuel Bagenstos, at 5-6 ¶ 13 ("Bagenstos Declaration") (Sept. 23, 2013).

CaptionCall agrees with the Consumer Groups that if the Commission is going to define a low-income threshold, the 400 percent of Federal Poverty Guidelines used in the Deaf-Blind program is as good a definition as any.[34] CaptionCall also suggests that the Commission explore other, non-income-based means to determine whether to waive the minimum payment requirement. For instance, many IP CTS users may have income that is greater than some multiplier of the federal poverty rate yet be unable to accommodate the extra cost required to purchase an IP CTS telephone because they are retired (the age demographic most likely to use IP CTS), on fixed incomes, and unable to afford any additional or extraneous costs. These individuals may need the accommodation provided by IP CTS but be unable or unwilling to pay $75 for the equipment if doing so means going without some other necessity, such as medication.

CaptionCall reiterates that an income-based exception does not cure the flaws in the $75 requirement—it is still a tax on access to an accommodation in violation of the ADA and forces IP CTS users to pay rates that are greater than those paid by hearing users for functionally equivalent service, in violation of the ADA's express requirements.[35] The minimum payment requirement substitutes an individual's willingness and ability to pay a steep price to purchase equipment for that individual's demonstration of actual need of that equipment to enjoy functionally equivalent telephone service.

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[34] *See* Petition for Stay of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Dead and Hard of Hearing Consumer Advocacy Network, Hearing Loss Association of America, National Association of the Deaf, American Association of the Deaf-Blind, Cerebral Palsy and Deaf Organization, CG Dockets No. 13-24 & 03-123, at 2 (Sept. 30, 2013) ("Consumer Groups Petition").

[35] *See* 47 U.S.C. § 225(d)(1)(D).

B. The $75 Minimum Payment Should Only Be Assessed Once.

CaptionCall also believes that, to the extent the minimum payment requirement is intended to serve as a proxy for need, it should only be imposed on a consumer once. Thus, the Commission's flawed rationale—that hearing-impaired users can signal their actual need for the accommodation by means of a relatively high payment for equipment—does not extend to requiring a minimum payment for *additional* equipment, whether hardware or software. A consumer that has already paid $75 for hardware (or software) equipment should not be expected to pay any additional amount for access to software or applications, and vice versa. Indeed, a consumer that has already paid $75 for hardware should not be required to pay any additional amount for additional *hardware* equipment, such as a second phone for his or her household. As long as the Commission requires a minimum payment for IP CTS equipment, it should limit application of that requirement to a single payment, irrespective of the number of hardware or software-based phones obtained. The Commission should also not create a technologically-biased requirement, such as requiring the $75 payment for hardware, but not for software. There is no legitimate justification for abrogating technological neutrality.

IV. IF THE "DEFAULT-OFF" RULE IS NOT STAYED, THE COMMISSION SHOULD ADOPT CHANGES TO MITIGATE THE EXTENT TO WHICH IT UNNECESSARILY IMPEDES HARD-OF-HEARING CONSUMERS' ACCESS TO CAPTIONING.

A. The Commission Should Allow Default-On Captions in Office Settings, in Homes Where Only Registered Users are Present, and Where Users Place an Ordinary Telephone Next to Their IP CTS Equipment.

CaptionCall believes that the Commission can and should permit exceptions to the default-off rule in situations where it is unlikely that a non-registered individual will use the IP CTS phone. In these settings, such as private offices and homes where only registered users are present, or where an ordinary telephone is placed next to the IP CTS equipment, there is simply no risk that someone will unnecessarily use captions. In an office setting, the registered user is

likely to be the only person using the phone; in homes where only registered users are present, there is a *de minimis* possibility that someone without need will inadvertently use the phone; and where ineligible users may have access to the IP CTS phone (complete with the mandated sticker stating that only registered persons can use the phone) but where an ordinary telephone is also available directly next to the IP CTS equipment, the ineligible users will be extremely unlikely to use the unfamiliar and conspicuously labeled IP CTS phone instead of a more familiar, traditional telephone.

By continuing to require the default-off setting even in these situations, the Commission oversteps its bounds. By asking how to prevent registered users from using captions when they don't need them, the Commission is attempting to paternalistically dictate when hard-of-hearing users can access ADA-mandated accommodations.[36] Once eligibility for IP CTS is established, the consumer should be able decide when he or she needs or doesn't need captions.[37] The Commission must ensure that any restrictions it places on IP CTS, no matter how well-intentioned, do not impact the availability of functionally equivalent service for consumers with hearing loss.

To that end, CaptionCall recommends that the Commission permit users in private offices and homes with only registered users present, or in offices and homes where ordinary telephones are placed adjacent to IP CTS equipment, to use their IP CTS equipment with a default-on setting. CaptionCall believes that these situations can be easily documented. For instance, the IP CTS provider could document the circumstances of equipment placement during installation, with attestation from the customer if necessary. Where appropriate, visual evidence of

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[36] *See* Bagenstos Decl. ¶¶ 6, 11.

[37] *See id.* ¶ 21

placement, via a photograph, could be obtained. Alternatively, and consistent with the Commission's requirements for determining general eligibility for IP CTS, the customer could self-certify his or her eligibility for the default-off exception.

B. Mandating Default-Off For 911 Is Not Feasible for Callbacks and Thus Will Not Eliminate Service Degradation in Emergency Situations.

The default-off rule creates significant risks of service degradation during emergency calls. Though CaptionCall continues to be concerned about the delay in captioning that customers will experience in non-emergency calls, particularly on inbound calls, those concerns are magnified in emergency situations. Customers are least likely to remember to turn captions on when calling 911 or when receiving 911 callbacks in emergency situations, increasing the likelihood that captions will be significantly delayed in these situations.

Even if providers are permitted to implement equipment upgrades that automatically turn captions on when an outbound 911 call is made, those upgrades will take time and money to implement and will only resolve the issue of delays on outbound calls. Inbound calls from public safety (callbacks) will still be subject to a several second delay while the IP CTS equipment recognizes that the inbound call is from public safety and turns on captions. CaptionCall questions, too, whether such implementation will ever be capable of capturing all inbound emergency calls—a great deal will depend on how those calls are identified and what mechanism the IP CTS phone must use to recognize a call is from 911.

C. Volume Control Should Function Independently from Captioning.

There is no technical reason for providers to link volume control to caption activation. Consumers should be able to adjust phone volume without activating captions. Linking the two functions would represent an inappropriate attempt to force unnecessary captioning. The Commission should require that IP CTS providers ensure that their equipment allows users to

adjust call volume without activating captioning—or activate captioning without adjusting the volume.

D. The Commission Should Permit Default-On Captions for Answering Machine Mode.

The Commission's underlying rationale for the default-off requirement is to ensure that users take an "affirmative step" before using captioning. But by activating answering machine mode on their phone, consumers have already taken that "affirmative step." There is no reason why a hearing person—or a hard-of-hearing person who doesn't need captioning—would activate answering machine mode. It is used only by consumers who need captions to hear their messages. Thus, there is no reason to introduce yet another "affirmative" requirement for consumers to use captioning for answering machine mode.

E. The Commission Cannot Shift Default-On Captioning Eligibility to the States.

As discussed below with respect to IP CTS eligibility more generally,[38] the Commission bears the responsibility of ensuring the nationwide availability of functionally equivalent relay services. Allowing states to determine when default-on captions are allowed would violate this obligation. Moreover, introducing state-by-state regulation of captioning would introduce hopeless complexity into equipment distribution and compliance practices, with the possibility of 50 different types of firmware and compliance obligations. This would expose providers to unbearable compliance costs and unacceptable risk of something "slipping through the cracks" of the tangled regulatory web that would result.

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[38] *See infra* Part VI.

V. CENTRALIZED REGISTRATION OF IP CTS USERS IS UNNECESSARY AND WILL BE COUNTERPRODUCTIVE.

Using a centralized database for IP CTS service has numerous drawbacks. Not only does a centralized database present privacy concerns, it also would create a single point of failure for IP CTS. More fundamentally, it is unclear what purpose such a database would serve for IP CTS. To the extent the Commission believes a centralized database might be used to allow a verified user to switch providers without demonstrating eligibility a second time, or to give RLSA a database against which to check numbers, CaptionCall questions whether these purposes are worth the expense and effort. In the case of determination of eligibility, that purpose cannot outweigh the privacy risks, given that users may demonstrate eligibility by self-certifying about their hearing loss and need for IP CTS. Regarding RLSA's ability to check numbers, the database would never be entirely reliable, as IP CTS call detail records can legitimately contain strings of numbers of more or less than 10 digits—such as when a customer uses a pre-programmed speed dial (resulting in fewer digits) or enters a PIN code or other tones after placing the call (resulting in more than ten digits).

Similarly, while TRS and VRS services will use a centralized database for per-call validation, such an exercise would be futile for IP CTS, as validation will not indicate *who* is making a call from IP CTS equipment, but only that the equipment is associated with a registered user. Even if per-call validation made logical sense, the IP CTS call flow prevents such validation from occurring before the call is connected, and would therefore increase delays in captioning.

Moreover, if the Commission were to somehow require the captioned telephone user to provide some information, such as a PIN, to authenticate the user, that would further raise barriers to access to the IP CTS accommodation. Particularly with aged users, a requirement to

remember and enter a PIN will make the service even less useful that it already is with "default off." Real-time eligibility verification is not likely to work, and thus it makes little sense to require IP CTS users' registration information to be placed in a centralized database just in case the information eventually becomes useful. Certainly such an anticipatory collection could never meet the requirements of the Paperwork Reduction Act.[39]

A. The Larger IP CTS User Base Creates Logistical Problems With Centralized Registration.

CaptionCall generally objects to the burden and privacy risks inherent in aggregating sensitive consumer data in a centralized database. A recent study suggests that as many as 16 million Americans could benefit from IP CTS.[40] Aggregating sensitive consumer data on this potentially enormous IP CTS subscriber base in a centralized database would not only place an enormous burden on IP CTS providers but would also create serious privacy risks for consumers. For instance, the Federal Trade Commission released a report last year calling on companies to incorporate "privacy by design" principles, one of which is to limit data collection to only that which is necessary for a specific business purpose, to ensure that consumers' private and sensitive information is protected from unauthorized access and theft.[41] A centralized database

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39 *See* 44 U.S.C.§§ 3506, 3508.

40 *See* Sergei Kochkin, *The Importance of Captioned Telephone Service in Meeting the Communications Needs of People with Hearing Loss, The Hearing Review,* at 28 (Mar. 2013), *attached as* Ex. A. to Letter from John T. Nakahata, Counsel to CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 13-24 (Aug. 22, 2013).

41 *See* Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, FTC Report, at 5-6, 26 (Mar. 2012). The federal government is subject to similar restrictions under the E-Government Act of 2002. *See* Executive Office of the President, Memorandum for Heads of Executive Departments and Agencies, *OMB Guidance for Implementing the Privacy Procedures of the E-Government Act of 2002*, at Attachment A, "E-Government Act Section 208 Implementation Guidance," (Sept. 26, 2003) *available at* http://www.whitehouse.gov/omb/memoranda_m03-22/.

of IP CTS users across the industry certainly does not serve a specific business purpose and, in fact, creates a single point of failure for the industry, which is an unacceptable risk that hearing users do not face.

These risks are not theoretical. Centralized databases of information are incredibly vulnerable to attack. Last year, the Utah Medicaid program was hacked, resulting the theft of sensitive personal information or Social Security Numbers of approximately 780,000 individuals.[42] Similarly—and much more recently—Adobe announced that information on over 2.9 million of their users was stolen, including credit card numbers and expiration dates.[43] And the privacy and security risks inherent to aggregated consumer information are particularly dangerous for IP CTS users, who are predominantly elderly and tend to be less comfortable with technology.[44] This demographic is heavily targeted by scams designed to exploit the cognitive limitations of age, and is much more likely to lose money to such frauds.[45] Were a centralized database of IP CTS users compromised by hackers, this data would be a treasure trove for those who prey on the elderly.

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42 *See* Emil Protalinksi, *Medicaid Hack Update: 500,000 Records and 280,000 SSNs Stolen*, ZDNet (Apr. 9, 2012), http://www.zdnet.com/blog/security/medicaid-hack-update-500000-records-and-280000-ssns-stolen/11444.

43 Dan Goodin, *Adobe Source Code and Customer Data Stolen in Sustained Network Hack*, ArsTechnica (Oct. 3, 2013), http://arstechnica.com/security/2013/10/adobe-source-code-and-customer-data-stolen-in-sustained-network-hack/.

44 *Cf.* Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 13-24 & 03-123, at 22 (Feb. 26, 2013).

45 *See* Applied Research & Consulting, Inc., *Financial Fraud and Fraud Susceptibility in the United States*, Research Report from a 2012 National Survey Prepared for the FINRA Investor Education Foundation, at 3 (Sept. 2013) ("Older Americans are particularly vulnerable. Americans age 65 and older are more likely to be targeted by fraudsters and more likely to lose money once targeted.").

Providers, who are subject to audit, already are required to collect and maintain detailed information regarding their customers in databases that do not have the privacy and logistical implications of a centralized registration database. Though a database might allow a verified user to switch providers without demonstrating eligibility a second time, CaptionCall questions whether that is worth the risk presented by aggregation of this information. Another purpose could be to give RLSA a database to check numbers against—but even that checking will not be reliable, given the legitimate reasons why an IP CTS user might have a number of more or less than 10 digits in length.

These drawbacks to centralized information aggregation create conditions that threaten the ability of IP CTS providers to provide a functionally equivalent service without any commensurate benefit, especially given the substantial registration requirements the Commission recently adopted for IP CTS users.

B. Call Flow in IP CTS Cannot Accommodate Caller Verification Without Significantly Degrading the Service.

Not only will creation of a centralized IP CTS user database create unreasonable risks and burdens, the database itself is not capable of being used to improve service or verification of eligibility. As CaptionCall has noted on the record in other proceedings,[46] a central feature of the centralized database for TRS services, TRS-URD, is per-call validation, a feature which simply will not work in IP CTS. Phone-number-based validation will not reveal *who* is placing the call on the IP CTS handset; rather, it can only reveal that the handset is associated with an eligible user. In addition, IP CTS numbers are usually assigned by the user's telecommunications

[46] *See* Sorenson VRS Auction Comments at 37-38.

carrier, not the IP CTS provider, making per-call validation even more difficult to implement.[47] Certainly such numbers are not unique to user, rather than to a phone, and thus cannot ensure that the user is an eligible individual.

Furthermore, many IP CTS providers, including CaptionCall, play no role in routing the underlying telephone calls and instead operate to the side of the existing telecommunications connection. Unlike VRS providers, CaptionCall has no control over when a call connects; it is not in the call stream and receives no carrier-to-carrier or carrier-to-end user signaling other than audio tones such as busy signals, "fast busy," or Special Information Tones. Thus CaptionCall cannot delay call connection until a call is validated against the database. If CaptionCall and other IP CTS providers are required to use a centralized database to verify call eligibility before beginning captions, the customer will lose captions at the beginning of the call—a direct threat to functional equivalence.

VI. THE ADA DOES NOT PERMIT THE COMMISSION TO MIGRATE IP CTS TO STATE TRS PROGRAMS.

The Commission cannot abdicate its obligation to ensure the availability of IP CTS to hard-of-hearing consumers. When it passed Title IV of the ADA, Congress sought to remedy a state-by-state system that had failed to meet the needs of deaf and hard-of-hearing consumers. Thus, Congress envisioned a nationwide system of TRS providers and required the FCC to ensure its implementation. Title IV expressly requires the creation of a "seamless interstate and intrastate relay system…that will allow a communications-impaired caller to communicate with anyone who has a telephone, anywhere in the country."[48] And the ADA obligates the

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[47] *See* Comments of Hamilton Relay, Inc., CG Docket Nos. CG Docket Nos. 10-51 & 03-123, at 6-7 (Aug. 19, 2013).

[48] H.R. Rep. No. 101-485(IV) at 28 (1990).

Commission to ensure the availability of relay services like IP CTS. It cannot delegate this function to state TRS programs.

State programs, in particular, have numerous problems that may lead to inadequate management of IP CTS. For instance, state TRS programs are "chronically underfunded and are subject to the uncertainties of state appropriations processes."[49] As described by the Consumer Groups in their recent stay petition, state equipment distribution programs illustrate the problems with giving states even more authority over IP CTS. Such programs have extremely limited quantities of equipment, may require users to return their equipment if they leave the state, and may only offer equipment that works with a single provider, depriving consumers of the ability to choose the provider that works best for their needs.[50] These problems mean that state programs *today* are incapable of providing functionally equivalent service;[51] it is unlikely that shifting all IP CTS obligations to states would suddenly change those deficiencies.

Deflecting responsibility to state programs would represent a significant step backward for the IP CTS program. Specifically, by shifting registration and certification functions to the states, the Commission would erect a significant barrier to the adoption of an ADA-mandated accommodation. Instead of allowing providers—who have departments and resources dedicated solely to these tasks, and are incentivized to complete them efficiently—to register and certify new users, the Commission's proposal will create a bottleneck, placing consumers at the mercy of 50 separate programs, which are frequently underfunded and have no incentive to process consumers efficiently. Furthermore, the Commission will have no leverage against states that

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[49] Consumer Groups Petition at 5; *see also* Comments of Hearing Loss Association of America, CG Docket Nos. 13-24 & 03-123, at 8 (Feb. 26, 2013).

[50] Consumer Groups Petition at 5-6.

[51] *Id.* at 6-7.

don't step up, and it will be an administrative impossibility to keep up with the processes and procedures of each state's program.

The Commission should also not shift any portion of its funding obligation to state programs. State TRS Programs are underfunded and subject to greater political pressures than the Fund. Transfer of oversight and administration of IP CTS programs to states thus increases the risk that IP CTS services will be cut or that funding will be reduced, making the service unavailable to those who need it, in contravention of the FCC's mandate under the ADA.

VII. THE COMMISSION SHOULD AVOID ADOPTING ADDITIONAL REQUIREMENTS THAT WILL UNNECESSARILY BURDEN PROVIDERS WITH NO DEMONSTRABLE BENEFIT FOR CONSUMERS.

A. Minimum Quality Standards Should Be Set by the Market.

IP CTS quality of service issues involve complex tradeoffs between accuracy and speed. It is simply not possible using existing technology for any provider to instantaneously deliver captions that are 100 percent accurate. Given that reality, it is necessarily the case that some users will be willing to sacrifice accuracy for greater speed, while others will want accuracy over speed. Those are decisions that can only be made by each user, not by a regulator. The Commission is simply not positioned to determine a preference for accuracy over speed or speed over accuracy for the universe of IP CTS users, each of whom has individual preferences. If the Commission attempts to adopt mandatory minimum quality standards, the result will be a greater burden for providers with no clear benefit for consumers.

Because IP CTS is offered by multiple providers, each of whom competes for customers, the Commission should instead let the market determine the optimal balance between speed and accuracy. Consumers should continue to be free to choose an IP CTS provider based on their personal preferences and the ability of that provider to offer service that aligns with those preferences. Mandatory minimum quality standards will take that choice away from consumers,

further undermining providers' ability to provide ADA-mandated functionally equivalent service.

B. The Commission's Advertising Proposals Will Only Further Discourage Eligible Consumers from Accessing IP CTS for Functionally Equivalent Telephone Service.

The Commission's proposed advertising requirements illustrate the problems inherent in the Commission's refusal to consider alternatives to default-off captioning. The Commission intends the default-off rule to prevent ineligible users from inadvertently using captioning. Given that requirement, the proposed advertising requirements would impose an increased, and unjustified, burden on providers, without any commensurate benefit for consumers. The problems with ineligible use that the Commission seeks to address with the advertising proposals are addressed by the default-off rule, thus rendering the advertising proposals unnecessary. Of course, were default-on captions permitted, the proposed advertising restrictions might serve a useful purpose in ensuring that only eligible, hard-of-hearing users access IP CTS. But the Commission proposes to require *both* the default-off and the suggested warning language, not one or the other. It should not do so.

Requiring providers to prominently place ominous warnings on their web pages and other marketing materials may drive away ineligible users, but it will also drive away those with an actual need for IP CTS. As noted above,[52] IP CTS users are predominantly elderly and often do not have an affinity for technology. Requiring providers to post scary warning labels is not going to have an appreciable deterrence effect on ineligible users; it will instead deter these eligible users. Moreover, that deterrence is largely unnecessary under a regulatory scheme that requires users to actively turn on captions any time they wish to conduct a captioned phone call.

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[52] *See supra* Part V.A.

If the Commission imposes its proposed advertising rules, it will only further discourage legitimate use of IP CTS.

CaptionCall believes that any warnings regarding ineligible use of IP CTS should not precede enrollment, but should rather be provided *after* the user has discovered and decided to enroll in IP CTS. In this way, the Commission would balance the need to educate consumers on the appropriate use of IP CTS against the requirement to ensure the availability of functionally equivalent service as mandated by the ADA.

C. The Commission Should Not Adopt a General Prohibition on Providing Service to Users Who Do Not Need It.

A generalized prohibition on providing service to users who "do not genuinely need the service" would be unenforceable and would serve only to allow the Commission to engage in *post hoc* enforcement against actions the rules do not currently prohibit. Because providers would lack notice that they engaged in a prohibited act, enforcement action would be invalid.[53] Moreover, the Commission cannot impose on providers the responsibility of determining whether a consumer "genuinely" needs IP CTS over other assistive devices. IP CTS providers can only determine whether a user meets reasonable eligibility criteria. The only person that can determine whether need for IP CTS is "genuine" is the user him- or herself.

VIII. CONCLUSION

The Commission should move to adopt a price cap rate methodology using market-based rates using its experience under MARS. It should also mitigate the negative repercussions of its

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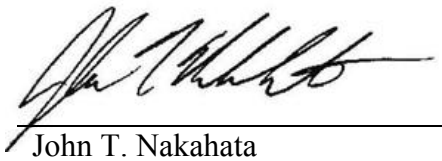
[53] *See Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 619 (D.C. Cir. 2000) ("Although we defer to the Commission's interpretation of its regulation as requiring actual minority control, we find that neither the regulation nor the Commission's related statements gave fair notice of that requirement.").

new IP CTS rules. In particular, it should exempt low-income consumers and consumers with fixed incomes from the $75 minimum payment, ensure the minimum payment requirement is imposed only once on any consumer, and adopt additional exceptions to the default-off rule. The Commission should also avoid implementing any new requirements that would impose a heavy burden on providers without any commensurate benefit, such as mandating the creation and use of a centralized database of IP CTS users, imposing mandatory minimum quality standards, requiring providers to display notification labels on all websites and marketing materials, or creating a generalized prohibition on providing service to users without "genuine" need. Finally, the Commission must retain oversight and administration of IP CTS and cannot transfer those obligations to state TRS programs.

Respectfully submitted,



John T. Nakahata
Christopher J. Wright
Timothy J. Simeone
Steven A. Fredley
Mark D. Davis
Walter E. Anderson
Kristine Laudadio Devine

WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Suite 1200
Washington, DC 20036
(202) 730-1300

Counsel for Sorenson Communications, Inc., and CaptionCall, LLC.

Michael D. Maddix
Director of Government
and Regulatory Affairs
SORENSON COMMUNCATIONS, INC.
4192 South Riverboat Road
Salt Lake City, UT 84123

Bruce A. Peterson
Senior Director of Marketing
CAPTIONCALL, LLC
4215 South Riverboat Road
Salt Lake City, UT 84123

November 4, 2013